

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20544**

Mediacom Communications Corporation     )  
Petition for Declaratory Ruling            )  
Concerning Indemnification Clauses        )     WC Docket 14-52  
In Pole Attachment Agreements            )

**COMMENTS**

Mediacom Communications Corporation (“Mediacom”), pursuant to Section 1.415 of the Commission’s Rules,<sup>1</sup> hereby submits these comments in support of a declaratory ruling unequivocally clarifying that indemnification clauses in pole attachment agreements between attachers and utility pole owners that impose asymmetric and non-reciprocal indemnification liability for negligence on the attaching parties are not “just and reasonable” terms and conditions of attachment and contrary to Section 224(b)(1) of the Communications Act.<sup>2</sup> For the following reasons, the Commission should issue such a ruling.

As discussed in detail in Mediacom’s declaratory ruling request,<sup>3</sup> this issue specifically arises in the context of Iowa state court tort litigation involving a deceased Mediacom employee fatally injured in 2011 while working on pole owned by Alliant Energy/Interstate Power and Light Company (“IPL”).<sup>4</sup> In that case, IPL is attempting to shift the liability risk for IPL’s own

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<sup>1</sup> 47 C.F.R. § 1.415.

<sup>2</sup> 47 U.S.C. § 224(b)(1).

<sup>3</sup> See Petition for Declaratory Ruling of Mediacom Communications Corporation, WC Docket 14-52 (filed Feb. 19, 2014).

<sup>4</sup> *Maribel Romero v. Interstate Power and Light, Interstate Power and Light v. MCC Iowa LLC*, Iowa District Court for Johnson County, Case No. LACV 075505. The conservator of the employee and subsequently his estate brought a personal injury and wrongful death action in Iowa state court against IPL asserting negligence due to the deteriorated condition of the pole. Based on an indemnification clause contained in the Mediacom-IPL pole attachment agreement that IPL contends requires Mediacom to defend and indemnify without regard to fault, IPL filed a third party claim for indemnification against MCC Iowa, LLC, a subsidiary of Mediacom. By seeking to assert the indemnification clause, IPL is taking the position that even if the court finds it to be wholly responsible for the wrongful death claim, it is entitled to shift liability entirely to Mediacom.

negligence onto Mediacom under the terms of an asymmetric indemnification clause contained in Mediacom's pole attachment agreement. But this issue is larger than just that case – despite Commission precedent indicating that such clauses are impermissible, utilities such as IPL commonly, steadfastly demand that pole agreements include such asymmetric indemnification language, laying enormous liability risk on attachers as part of the “bargained-for” price of attachment. Because all such clauses are not “just and reasonable” terms or conditions of attachment, and conflict with past Commission pronouncements, the Commission should issue a plain statement that they are contrary to Section 224(b)(1), therefore not allowed, and, if they exist, not enforceable.

Because of the utilities' transience, many pole agreements contain asymmetric indemnification clauses. For example, the IPL attachment agreement contains the following indemnification language:

MCC Iowa, LLC agrees to take all necessary precautions to safeguard the public against damages or injury and to save IPL and/or WPL harmless from any and all damages, expense, cost and reasonable attorney fees on account of injury to person, life or property or injury resulting in the death of any person or persons in any manner arising out of or in connection with attachment, removal, relocation, rearrangement, reconstruction, repair or over-lashings of MCC Iowa, LLC's facilities to IPL and/or WPL's poles. If IPL and/or WPL is made a party to any suit or litigation on account of injury or damage or alleged injury or damage to person, life or property or on account of an injury or damage or alleged injury resulting in the death of any person or persons, arising out of or in connection with the attachment, removal, relocation, rearrangement, reconstruction, repair or over-lashings of MCC Iowa, LLC's facilities to IPL and/or WPL's poles, MCC Iowa, LLC will defend such actions on behalf of IPL and/or WPL, including claims or causative action at common law arising under any statute. If judgment shall be obtained or claim allowed against IPL and/or WPL, MCC Iowa, LLC will pay and satisfy such judgment or claim in full. IPL and/or WPL shall be indemnified except to the extent that such claim is the direct result [their] own gross negligence or willful misconduct.

Under this clause, in addition to being responsible for its own negligence and gross negligence/willful misconduct in connection with its use of the pole, Mediacom is additionally responsible for IPL's own negligence in connection with the poles, including IPL's own negligent maintenance of the poles. Thus, should the clause be enforced as written, Mediacom is potentially required to fully indemnify IPL for any liability should IPL's own negligence be determined to be the cause of an injury.

Such language is not an outlier. Utility demands for such clauses are unfortunately common, and many pole attachment agreements contain such clauses. In fact, many utilities go a step further, unconditionally demanding that an attacher not only fully indemnify for the utility's negligence, but also for its gross negligence, willful misconduct, and even criminal conduct!

When attachers push back on such language in negotiations, utilities typically do not budge, again claiming that the asymmetric risk is part of the price of attachment. For example, in Mediacom's negotiations with IPL, when Mediacom pushed back on the above language, IPL curtly responded: "Katy I can tell you that the Alliant legal staff will not approve any change to the indemnity language. Alliant has gone through this process too many times and Alliant will stand firm on this language. The feeling is that Alliant owns the poles and these are the terms if you wish to attach."<sup>5</sup> Again, such steadfast refusal to back off demands for asymmetric indemnification language is common practice.

Such clauses are patently unreasonable and should not even be in the realm of the possible. Under Section 224(b)(1) and related Commission rules and orders, terms and conditions contained pole attachment agreements between cable operators and electric utilities must be "just and reasonable." The Commission has addressed "just and reasonable"

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<sup>5</sup> December 14, 2001 email from Dean Counselman, Manager, Alliant Energy to Katy O'Donnell, Mediacom. Alliant Energy is the corporate parent of IPL.

indemnification clauses just once. In the Enforcement Bureau's 2003 *Georgia Power* order, the Bureau explained:

### **8. Indemnities/Limits of Liability**

30. The Cable Operators object to several aspects of the New Contract's provisions concerning indemnities/limits of liability, namely sections 8.1 (requiring the Cable Operators to indemnify Georgia Power from and against liability, but not vice versa), 8.2 (placing a six-month limitation on claims against Georgia Power), and 8.4 (allowing Georgia Power to control the defense of claims against the Cable Operators). Georgia Power's arguments in defense of these provisions miss the mark, and we find the provisions to be unreasonable.

31. As an initial matter, Georgia Power relies generally on the Cable Operators' allegedly poor safety practices as a justification for the challenged provisions, claiming that it should not be required to pay for damages it did not cause. As explained above, however, the record in this case does not support the safety defense. In any event, the Cable Operators do not contend that indemnification provisions generally are unreasonable; instead, they claim that these particular provisions are unreasonable. Second, Georgia Power argues that, because of mandatory access, a non-reciprocal indemnification provision is warranted given that the Cable Operators allegedly pose a "far greater, and unwanted, risk" to Georgia Power in the pole attachment process. A reciprocal indemnification provision, however, simply would result in each party assuming responsibility for losses occasioned by its own misconduct. Consequently, if Georgia Power is correct that the Cable Operators more frequently are the "bad actors," then the Cable Operators more frequently would be called upon to indemnify. Finally, Georgia Power offers no response to the Cable Operators' argument that they should not be forced to bring claims in a shorter period than required by law or to relinquish their right to defend claims against them. We cannot discern any rational basis to support those contractual provisions.<sup>6</sup>

Notwithstanding the Commission's instruction that indemnification clauses must be fully reciprocal with each party held liable only for any losses caused by their own misconduct, utility pole owners continue to insist on non-reciprocal indemnification clauses akin to IPL's. When pressed, utilities argue that the Bureau's holding in *Georgia Power* was less than perfectly clear,

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<sup>6</sup> *Cable Television Association of Georgia v. Georgia Power Co.*, Order, 18 FCC Rcd 16333, ¶¶ 30-31 (Enf. Bur. 2003), *recon. denied* 18 FCC Rcd 222871 (Enf. Bur. 2003).

especially in the context of ordinary negligence. They also continue to argue that despite the Commission's rejection of the claim, such clauses are justified because attachers pose extraordinary risks due to their unfamiliarity working near dangerous live electrical lines. They will also claim that there can be no such thing as a reciprocal indemnification clause as Mediacom doesn't have its own poles. They will also raise unrelated and unsupported claims of unauthorized attachments, safety violations, and worker training to justify such language.

To remove any uncertainty, the Commission should issue a plain, unequivocal clarification that (1) that each party to a pole attachment agreement should be liable for, and only for, their own misconduct, and (2) indemnification clauses that impose any asymmetric indemnification liability risk on the attaching party are not "just and reasonable" terms and conditions of attachment. In this vein, we also ask that the Commission clarify that negligence, gross negligence and willful misconduct are all forms of misconduct for which each party to a pole attachment agreement should be held wholly responsible for its own conduct.

Finally, such a statement makes good policy sense. First, plain clarification would eliminate unnecessary and inefficient negotiations over what should be a non-issue. Second, each party should ultimately be responsible for its own bad behavior, as only the risk of full liability for one's own actions provides the proper incentive to efficiently mitigate safety risks. To hold otherwise would allow pole owners to unjustly shift the cost of their own misconduct onto attachers, and create disincentives for pole owners to maximize the safety of their distribution plant.

## CONCLUSION

Mediacom merely seeks clarification, once and for all, that an attacher to a pole should not be forced to bear liability resulting from the misconduct of the pole owner. For the foregoing reasons, the Commission should issue a declaratory ruling with a plain, unequivocal clarification that (1) that each party to a pole attachment agreement should be liable for their own misconduct, but not the misconduct of the other party, and (2) indemnification clauses in such agreements that impose any asymmetric indemnification liability risk on the attaching party are not “just and reasonable” terms and conditions of attachment, and therefore are therefore contrary to Section 224(b)(1) of the Communications Act.

Respectfully submitted,

**MEDIACOM COMMUNICATIONS  
CORPORATION**

By: \_\_\_\_\_

  
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